# REFORM IN CRIMINAL PROCEDURE

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The fundamental principles of criminal procedure are these:

(1) The object society has in the administration of criminal justice is to protect innocent, industrious citizens from unlawful interference or injury threatened by criminals. The thought of vengeance should not enter into it.

(2) For this purpose, experience shows that promptness and certainty of administration are far more effective than severity. To use the language of the old Hebrew prophet, "Because sentence against an evil work is not executed speedily, therefore the heart of the sons of men is fully set in them to do evil."

The vices of our American criminal administration spring from servile adherence to tradition, without regard to existing conditions. The criminal code of England a century ago was cruel. The humanity of the judges led them to use every possible technicality to mitigate the severity of the penalties imposed by the statute law. The development of humanity and Christian principle has led to radical changes in penal legislation. The penalties imposed by the penal code cannot be said in any state to be unduly severe. The English courts have modified their old traditions in criminal administration to meet the change in penal legislation. In most of the states of the American Union the courts have not done this, but have adhered to the technical rules of administration which promote the release of the guilty and the consequent suffering of the innocent. The most flagrant instance of this is a recent decision in Missouri. That was an indictment for rape. The proof was clear and the man was convicted, but a writ of error was sued out and the lawyer discovered this defect in the indictment: the constitution of Missouri requires that the indictment should conclude, "against the peace and dignity of the state," but in engrossing the indictment the article "the" was omitted before the word "state." The Supreme Court of Missouri held, in State *vs.* Campbell (210 Mo., 202), that the omission was fatal, although they said (p. 234): "The testimony, as disclosed by the record in this case, was amply

sufficient to warrant the court in submitting the question to the jury." They reversed the judgment of conviction. The indictment being held void, of necessity the guilty man would go free unless a new indictment should be found and the case tried again.

It is impossible to conceive a greater perversion of justice than this. The guilty man is set free, emboldened by impunity to commit similar crimes in the future. Or, if the state again indicts him, his innocent victim is called upon to again go through her pitiful story in public before another judge and jury.

Perhaps there is no state which has made so much progress in the reform of criminal procedure as the State of New York. The penal code of that state provides that the judgment shall be given without regard to technical errors or defects or exceptions which do not affect the substantial rights of the parties (Code of Criminal Procedure, sec. 542). In a recent decision of the New York Court of Appeal (People *vs.* Strollo, 191 N. Y., 42), the court, in dealing with this section, said:

"Under the statute our powers and duties in capital cases are strictly correlative. While we have power to reverse in the interests of justice, even where no exceptions are taken, it is also our duty to disregard errors which, although excepted to, do not affect the substantial rights of a defendant. Guided by this rule, we feel constrained to hold that none of the general criticisms referred to under this head present sufficient grounds for reversal."

The American Bar Association has for several years been considering this subject, and at its last meeting adopted with substantial unanimity the report of its committee, which recommended that an act of Congress should be passed providing as follows:

"No judgment shall be set aside, or reversed, or new trial granted, by any court of the United States in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless, in the opinion of the court to which application is made, after an examination of the entire cause, it shall appear that the error complained of has resulted in a miscarriage of justice."

A bill embodying this recommendation is now pending before Congress. Hearings have been had upon it both in the Senate [1] and

[1] Senate bill No. 4568.

in the House of Representatives.[2] It is very much in the public interest that it should be adopted. If Congress should set the seal of its approval upon this recommendation, we not only effect a much needed reform in Federal administration, but it would serve as an example to those states which are still suffering from the thraldom of technical and obsolete rules on this subject.

Another gross perversion of justice that has, unfortunately, become too common in this country is the abuse of the writ of habeas corpus. This writ is one of great value. It is, perhaps, the most important safeguard of personal liberty. All the more should it be shielded from abuse, lest the time come when the abuses become so great that they lead to drastic legislation restricting the essential functions of the writ. In effect, the writ of habeas corpus requires the State which holds a person in custody in some one of its many departments to state to a judge the reason for his detention. The hearing upon this writ should not be subject to technical restrictions. Every opportunity should be afforded to the imprisoned person to produce evidence in support of the contention that he is entitled to his liberty. The United States Habeas Corpus Act (U. S. Revised Stat., §§ 751-765) is a model in this respect. But the courts, in administering the law on this subject have failed to follow the practice which prevails in most cases, and to hold that when a question has once been fairly tried, and the opportunity has been given to the parties to present their evidence fully, the decision should be final. On the contrary, it has frequently been the case that successive applications of the writ of habeas corpus to review the reasons for the detention of the same culprit have been made to different judges, and that these applications have resulted in successive trials of the same question, without much regard to the decision had upon any of the previous hearings. The law on this subject should be amended so as to make the decision of the court upon the first hearing final, subject, of course, to proper review on appeal, and subject to such application on the ground of newly discovered evidence as the law allows in all cases.

There is another gross abuse of this writ, and of the right of appeal connected with it, to which attention should also be called. Cases have frequently arisen during the last twenty years in which, after a decision of the court of a state adjudging that an accused

[2] House bill No. 14,552.

person is guilty and awarding the penalty for his offense, a writ of habeas corpus is obtained from a judge of a Federal court. This is done on the pretext that some Federal question—that is to say, a question arising under the constitution or the laws of the United States, is involved in the judgment of the state court. When the Federal judge decides that no such question is involved, an appeal is taken to the Supreme Court of the United States. Under existing legislation, until very recently, the appeal in such cases was a matter of right. In 1908 the law on this subject was so amended as to provide that in the case stated "no appeal to the Supreme Court should be allowed unless the United States court by which the final decision was rendered, or a justice of the Supreme Court, shall be of opinion that there exists probable cause for an appeal."

This enactment was much needed. But it did not reach another method of the ingenious men who, to use the language of Trollope, are successful "in the manumission of murderers and the protection of the criminal classes." This is, to apply to the Supreme Court of the United States for a writ of error to review a decision of the state court which has convicted a criminal and awarded his punishment. Under the present law this writ is a writ of right. Once granted, it suspends the execution of the sentence of the court below. Then hysterical appeals are made for commutation of punishment. The maxim that society has an interest in the punishment of the guilty is entirely overlooked. The whole system tends to make the punishment of crime as uncertain as human laws can make it. The old maxim is forgotten: *"Judex damnatur cum nocens absolvitur."*

The same committee of the American Bar Association which recommended the reform before referred to has in this particular instance also sought to bring about improvement in judicial procedure by recommending an enactment that in the cases referred to no writ of error shall be allowed unless "a justice of the Supreme Court shall certify that there is probable cause to believe that the defendant was unjustly convicted." This recommendation is embodied in the bills before mentioned. It gives to the person, if such there be, who is unjustly convicted a full opportunity to maintain this proposition before the Supreme Court. But it takes away the shield afforded by the present technical defenses, which appear solely for the protection of the guilty and the injury of the innocent.

Let me suggest one more inconsistency in the criminal pro-

cedure of this country, which would seem to merit the careful consideration of this association. The criminal codes of probably all the states of the Union provide in substance, as does the penal code of the State of New York (sec. 20), "An act done by a person who is an idiot, imbecile, lunatic or insane is not a crime."

When insanity is to be set up as a defense, the judge leaves it to the jury to say whether the accused was insane when the crime was committed. This opens the door to the sham defenses of emotional insanity, of temporary insanity and the like. Where the accused is wealthy he can protract the trial and introduce a cloud of witnesses who really obscure the truth. The public scandal is unspeakable. Why should this defense be permitted at all?

If it be said that a person who is really insane is not morally guilty, we reply: The question of moral guilt is irrelevant. The state has no right to punish moral guilt. Its duty, as before stated, is to protect the innocent, industrious citizen from unlawful interference.

If it be said that an insane person has no control over himself, we reply that, generally, this is not true. As a rule, insane persons are amenable to the discipline of rewards and punishments. And in the exceptional cases where they are not so amenable, the need of protection to the innocent is even more imperative.

If it be said that sometimes the provocation to a violent blow is great, and tends to diminish the guilt of the offender, we reply that, irrespective of insanity, evidence of provocation is now admissible, and would continue to be, though the defense of insanity were abolished.

If it be said that it would shock public sentiment to put an insane person to death, we reply: What better can you do with a person who has a homicidal mania? Will you protect and nourish him so as to enable him to slay his keepers? That is what the homicidal insane often do. It seems to me wicked to prolong their lives at the expense of the innocent victims of such madmen. The innocent and useful citizens are entitled to first consideration.

Moreover, the cause of humanity demands that a person who is hopelessly and violently insane should be painlessly put to death. Continued existence to him is wretchedness.

> "He hates him
> That would upon the rack of this tough world
> Stretch him out longer."